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IN THE

Supreme Court of the United States

October Term, 1979

ALLIED CHEMICAL CORPORATION, ET. AL.,
Petitioners,

VERSUS

DAIFLON, INC.,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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The respondent, Daiflon, Inc. ("Daiflon") respectfully submits its brief in opposition to the petition of Allied Chemical Corporation, E. I. DuPont DeNemours & Co., Kaiser Aluminum & Chemical Corporation, Kaiser Aluminum & Chemical Sales, Inc., Pennwalt Corporation, Racon, Incorporated, and Union Carbide Corporation (hereinafter "defendants") that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

QUESTION PRESENTED

The Court of Appeals for the Tenth Circuit determined that the district court, in granting the defendants' motion for a new trial, committed a clear abuse of discretion by overturning the jury verdict as to liability. The question presented upon the present petition for a writ of certiorari is

whether the lower court's decision conflicts or is inconsistent with prior decisions of this Honorable Court and or other federal courts with regard to the proper scope of appellate review under the All Writs Act.

STATEMENT OF THE CASE

The "Statement of the Case" provided by the defendants at pages 3 through 12 of their Petition For a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (hereinafter the "Petition") is not a fair presentation of the background facts relevant to the issues presented to this Court for review. On the contrary, the statement set forth in the Petition is argumentative in tone, self-serving and highly misleading. Consequently, Daiflon elects, pursuant to Rule 40 of the Rules of this Court, to submit the following statement of the case, which statement is intended to fairly and accurately summarize the historical background considered by the Court of Appeals for the Tenth Circuit, together with that Court's judgment and opinion regarding the propriety of a limited application of supervisory mandamus within the perspective of the record facts therein presented.

Proceedings in the District Court

Daiflon was organized and incorporated in 1969 for the purpose of initially importing refrigerant gas from Japan, repackaging that gas, and reselling it in the non-automotive replacement market. The defendants are the domestic manufacturers of refrigerant gas. During the period 1969-

1972, defendants marketed refrigerant gas in various size cylinders through "full line" air conditioning and heating wholesalers, who then resold the gas (in cylinders) to servicemen and contractors. Daiflon marketed its gas to prospective purchasers regardless of their level in the chain of distribution and, therefore, Daiflon competed directly with defendants for some wholesale accounts, and further competed directly with other of defendants' wholesalers for retail accounts. On March 15, 1971 the defendants reduced the prices of refrigerants by 13%, and in March of 1972 the defendants again lowered prices dramatically (this time only on the two grades of refrigerants sold by Daiflon). Daiflon ceased business operations on October 12, 1972, and the defendants thereafter immediately increased prices to the levels prevailing prior to the first reduction of March 15, 1971.

On July 12, 1972 Daiflon filed a complaint in the district court alleging violation by the defendants of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2. Daiflon contended that the defendants had entered into an unlawful price-fixing conspiracy in order to set prices, temporarily, at a low level to exclude Daiflon from the market in violation of §1 of the Sherman Act, 15 U.S.C. §1. Daiflon further stated that the defendants conspired to monopolize the non-automotive refrigerant gas replacement market, and that the defendant DuPont attempted to, and did in fact, monopolize that market during the period of Daiflon's operations, 1969-1972. The complaint alleged that Daiflon's

losses and the destruction of its business were caused by the defendants' anticompetitive conduct, and that total damages exceeded $3,000,000.00.

In September of 1974 the trial judge, the Honorable Luther Bohanon, dismissed Daiflon's action with prejudice citing to Rule 37(B) (2) (C) F.R.Civ.P. At that time the trial judge determined, without the benefit of a hearing, that Daiflon failed to properly answer one of many interrogatories propounded by the defendants. This failure, reasoned the district court, was inexcusable and entitled the defendants to dismissal, with prejudice, of all claims. *Daiflon, Inc.* v. *Allied Chemical Corp.*, 64 F.R.D. 690 (W.D.Okl. 1974). Upon appeal, the Court of Appeals for the Tenth Circuit reversed the district court's order and judgment of dismissal and remanded the case for trial. *Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221 (10th Cir. 1976), cert. den., 429 U.S. 886.[1]

Following remand to the district court, the defendants filed a motion for summary judgment under the provisions of Rule 56 F.R.Civ.P. The district court denied the defendants' request for summary judgment, and in March, 1979 (almost three years following the circuit's reinstatement of the case), trial by jury commenced. During the trial, Daiflon called twenty-five witnesses, and approximately 276 of its exhibits were admitted into evidence. The district court excluded approximately 423

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[1]Defendants' petition for a writ of certiorari was assigned Case No. 76-243 by the Clerk of this Court.

exhibits offered by Daiflon. (The district court's order relating to the admissibility of contested exhibits is included as Appendix "D", Vol. I, p. 000, to this Brief). At the conclusion of the evidence presented by Daiflon, the defendants jointly moved for a directed verdict. In denying the defendants' motion the district court noted that an issue was presented "***for the jury to decide, as I view it at this stage of the trial of this case." (Tr. of Trial Proceedings, March 20, 1979, p. 53.[2]

The defendants then presented their evidence which consisted of the testimony of five live witnesses and the introduction of approximately 100 exhibits. All of the defendants' exhibits, *without exception*, were admitted by the district court. Notwithstanding the fact that the defendants' witness list disclosed approximately twenty live witnesses and fourteen witnesses by deposition, which included various representatives of each of the defendant corporations, no officers or employees of the defendants were called as witnesses at trial, with the exception of a computer programmer employed by the defendant Union Carbide Corporation. The testimony of this witness was

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[2]The district court made no comment whatsoever upon the denial of the motion for a directed verdict with respect to the evidentiary problems subsequently referred to in the order granting the motion for a new trial. The rulings and comments made by the district court upon the defendants' post-trial motions have been appended by the lower court to their judgment and opinion as Exhibit "A". See *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1261-1262 (10th Cir. 1979). The official report of the circuit court's opinion is hereinafter referred to as the "Mandamus Opinion".

merely for the limited purpose of authenticating a computer print-out, which was subsequently offered and received into evidence as an exhibit.

The defendants, having presented no evidence in connection with Daiflon's claim of loss of profits, loss of capital investment, debt position, or going concern value, concluded their case.[3] The defendants, following brief rebuttal testimony by Daiflon, unsuccessfully renewed their motion for a directed verdict.

On March 29, 1979 the trial judge submitted the case to the jury on a special verdict form which the defendants had requested.[4] The jury deliberated for approximately nine hours over a two-day period and subsequently returned the special verdict with the following findings: That all defendants "inclusive" conspired with each other to violate the federal antitrust laws (Special Verdict, Findings 1 and

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[3]The Tenth Circuit correctly perceived the trial judge's apparent anguish and dilemma resulting from defendants' last-minute decision not to call any of their representatives as trial witnesses:

> "There is reason to believe that the trial judge was somewhat dissatisfied with the presentation which was made by the defendants in that he felt that this should be changed in the event of a second trial.
>
> The judge is, of course, not in a position of advocacy unless he does hold the view (and this has to be read between the lines) that the court should encourage the development of the defendants' case, he would be acting outside of and beyond his authority. The fact that one side was not prepared to the extent that the court felt it ought to have been is not a basis for the grant of a new trial." (Mandamus Opinion, p. 1258).

[4]"The Special Verdict, in our judgement, accurately reflects the instructions given to the jury." (Defendants' Objections to Plaintiff's Proposed Amendments to Special Verdict, filed March 29, 1979).

2); that DuPont's share of the relevant market during the period 1969-1972 exceeded 50% (Special Verdict, Finding 3); that DuPont had the specific intent to acquire monopoly power and that there was a dangerous probability that it would ultimately do so (Special Verdict, Finding 4); that DuPont had monopoly power during the period 1969-1972 (Special Verdict, Finding 5); that such monopoly power was willfully and unlawfully acquired (Special Verdict, Finding 6); that Daiflon's business and property losses were proximately caused by the defendants' unlawful conspiracy *and* DuPont's individual monopolization efforts (Special Verdict, Findings 7 and 8); that Daiflon proved by a preponderance of the evidence the reasonable value of its business and property losses, and that its evidence was not unduly speculative (Special Verdict, Finding 9); and that the reasonable value of Daiflon's business and property losses was two million five hundred thousand dollars ($2,500,000.00). The Special Verdict is included as Appendix "A" to this brief.

The District Court's Judgment

The Special Verdict of the jury was returned on Friday afternoon, March 30, 1979. On the following Monday, April 2, Daiflon submitted to the district court a proposed judgment to be entered in accordance with the provisions of Rule 58(2) F.R.Civ.P. The proposed judgment is set forth as Appendix "B" to this brief. The judgment was submitted by the clerk of the court to counsel for the defendants for approval as to form. No objection was made by the

defendants. On April 9, 1979 the district court entered its judgment, which essentially followed the provisions of Daiflon's proposed judgment, with the significant exception that the court's judgment awarded Daiflon the sum of $2,500,000.00 rather than the statutory trebled amount of $7,500,000.00. The district court's judgment is set forth as Appendix "C" to this brief.[5]

Post-Judgment Proceedings
In The District Court

On April 12, 1979 Daiflon filed a motion to include treble damages and judgment pursuant to 15 U.S.C. §15 together with a supporting memorandum brief. The defendants did not respond to the motion, and no action on the motion was taken by the district court.

Within the time allotted by Rules 50 and 59 F.R.Civ.P. the defendants moved for judgment notwithstanding the verdict and for a new trial. Daiflon filed a responsive brief to the post-trial motions, a copy of which is included as Appendix "E" to this brief. A hearing was held on May 14, 1979 to consider the defendants' motions at which time the district court heard the arguments of counsel. Thereafter, the trial judge orally delivered his order denying the motion for judgment n.o.v. and granting the motion for new trial. The district court initially concluded that it could not "***under any circumstances, grant judgment NOV, it just would not fit this case at all." (Mandamus Opinion, p. 1261)

[5]The court did not circulate its judgment to counsel for Daiflon or defendants for comment or approval as to form.

However, the trial judge indicated that the jury verdict must be vacated in its entirety and a new trial granted. The first reason advanced in support of the district court's action involved the effectiveness of Daiflon's lead trial counsel, B. Hayden Crawford:

> I say this to you, Mr. Crawford, you are an exceedingly good lawyer, and you make a lot of things that are really not important, as I view it from the evidence; but you had this jury in the palm of your hand almost from the beginning." *Id.*

The district court thereafter chronicled problems which it and the defendants had purportedly encountered as a result of Daiflon's alleged failure to comply with pre-trial orders relating to the introduction of exhibits.[6] *Id.*, pp. 1261-1262. It is interesting to observe that the trial judge did not, in his new trial order, specify which, if any, of Daiflon's exhibits were improperly received. (See Mandamus Opinion, p. 1259 for the Circuit Court's Comments regarding this issue).

The trial judge then noted his "***full and complete appreciation for the work of the jury in this case, and full regard for their stability in the solving of matters of this kind ..." Nevertheless, the district court observed that the case is

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[6]Daiflon's position as to its compliance — and the defendants' default — with the district court's pre-trial orders is set forth in detail in the following appendices to this Brief: Plaintiff's Response to Defendants' Motion for Judgment Notwithstanding Verdict and for new Trial, App. "E", pp. 120a-134a; Petition for Writ of Mandamus and/or Writ of Prohibition, App. "F", pp. 158a-163a; Reply of Petitioner to Respondent's Answer to Petition for Writ of Mandamus and/or Writ of Prohibition, App. "J", pp. 355a-364a.

not an easy kind of a case for a jury since "***the issues are completely foreign to them. They don't understand about this gas business. After weeks of work they get to where they do." *Id.*, p. 1262

The trial judge then turned to the damage question, and indicated his dissatisfaction with the jury award:

> "When you consider the verdict, two and a half million dollars - when you consider that this company started out with a capital investment of $200,000.00 to get into a business that runs into the millions, it would be just like me going out there and saying, 'I am going to go into the oil business, and I am going to get a block and drill a well, on $100,000.'
>
> Why, you couldn't even get started.
>
> The $200,000.00 that the plaintiff had wasn't enough to really get them started into breaking into this business, as long as the defendants were concerned about their business."[7] *Id.*

The district court then observed that the defendants "***had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise." The district judge then indicated his concern with regard to the trebling requirements of the antitrust laws:

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[7]While the Court of Appeals for the Tenth Circuit did not vacate the new trial order relating to damages, it did recognize the district judge's erroneous findings with regard to critical facts underlying the damage award:

> "His main reason is stated as his next point in the informal findings, that the verdict of $2.5 million indeed was excessive inasmuch as the original capital investment was only $200,000.00. It should be said at this time that the trial court was not correct in this statement because the actual initial capital was $300,000.00 together with a very substantial line of credit amounting to approximately $500,000.00." (Mandamus Opinion, pp. 1258-1259)

> "Now the Act provides that where you find a conspiracy, and it is operation, why, for punishment the Court adds, triples it; but you can't say there's two and a half million dollars in damages from the years 1969, 1970 and 1971 operation." *Id.*, pp. 1262-1263.

The district judge thereafter proceeded to outline the procedures which it desired to follow with regard to the admissibility of exhibits prior to the second trial, and stated that he intended to allow "***a fixed time for further discovery."[8] *Id.*, p. 1263. The district court concluded:

> "Well, the Court is absolutely not satisfied with it. The verdict of the jury, the Court, was shocked when the verdict was read of two million five hundred thousand based upon the evidence before that jury, just does not justify that kind of a verdict." *Id.*

The Mandamus Proceeding and Judgment of the Court of Appeals

Less than two weeks following the new trial order, Daiflon filed a Petition for Writ of Mandamus and/or Writ of Prohibition with the Court of Appeals. (The petition is included as Appendix "F" to this brief.) Daiflon requested that the appeals court assume jurisdiction under the All Writs Act, 28 U.S.C. §1651, as implemented by Rule 21(a) of the Federal Rules of Appellate Procedure, and issue a writ of mandamus, or in the alternative a writ of prohibition to the district court directing the respondent judge to

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[8]It is not clear exactly what the district court had in mind with regard to additional discovery. At the time of the new trial order the case had been pending for nearly seven years, and no request had been made for further discovery.

reinstate the special verdict of the jury and enter judgment thereon as required by law, set a hearing for determination of a reasonable attorneys' fee to be included in the judgment, and prohibiting the respondent judge from proceeding further relative to the order for a new trial. The Court of Appeals received a responsive brief from the defendants and on August 10, 1979 entered an order directing the parties[9] to prepare and sign a narrative statement of the case "***along the lines provided in Rule 10(d) of the Rules of Appellate Procedure. Each side shall prepare a summary of the evidence presented by it at the trial. These summaries shall be simultaneously prepared and shall be simultaneously submitted on or before September 11, 1979." (The order of August 10, 1979 is included as Appendix "G" to this Brief.) Pursuant to the order and directive of the Court of Appeals Daiflon and the defendants simultaneously filed their narrative statements of the case.[10] (The respective narrative statements of Daiflon and the defendants have been included as Appendices "H" and "I" to this Brief.)

On December 21, 1979 the Court of Appeals entered

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[9]The district judge, by letter dated May 30, 1979 to the Clerk of Court of Appeals for the Tenth Circuit, indicated that he had received Daiflon's petition and stated that he would make no appearance in the case.

[10]It should be noted here that the defendants did not, in the mandamus proceeding, present any objection whatsoever to the procedure established by the appeals court with regard to the filing of narrative statements of the case. This fact is important in view of the arguments now advanced by defendants with regard to the impropriety of the lower court's August 10 order. (See Defendants' Petition, p. 8 [fn. 9] and pp. 24-25.)

the judgment which the defendants now seek to have this Court review by certiorari. In summary, the appeals court concluded that Daiflon had discharged its burden of demonstrating that the district court's new trial order as to liability was "***so extraordinary as to evidence arbitrariness and a clear abuse of discretion." (Mandamus Opinion, p. 1251) The Court of Appeals thoroughly reviewed the trial court's comments in connection with its ruling on the defendants' post-trial motions and concluded that "***there is no rational basis furnished for granting a new trial other than the magnitude of the verdict." *Id.*, p. 1259. The Court of Appeals continued:

> "On the subject of liability, this is not a case in which the evidence to establish liability is vague and questionable. The evidence supported the conclusion that the several defendants engaged in a 'buccaneering' scheme designed to eliminate the plaintiff as a contender. To be sure, Daiflon's market share was relatively small, but the price manipulation and the timing lends itself to the interpretation that elimination of Daiflon was an object of the conspiracy. Defendants lowered their prices by 13%, thus foregoing substantial profits.
>
> * * *
>
> The trial judge offered no rational basis for invaludating the jury verdict in its entirety. He pointed out no particular error in law or in the receipt of evidence. He appeared to have ordered a new trial primarily because he was shocked with the size of the verdict. By so doing, the trial court invaded the provence of the jury as the primary trier of fact..." (citations omitted) *Id.*, pp. 1259-1260.

The Court of Appeals comprehensively discussed prior decisions of this Honorable Court and of other circuit courts of appeal with regard to the exception allowing appellate review of otherwise interlocutory orders by extraordinary writ, and stated that it was "***convinced that a case has been made here for review by supervisory mandamus on the issue of liability of the defendants to the plaintiff-petitioner." *Id.*, p. 1260. The appeals court ordered that the trial court reinstate the jury verdict insofar as it determines the defendants to be liable and directed the trial court to proceed to retry the damage part of the case. In this connection, the Court of Appeals noted that, upon the damage retrial, the trial court should carefully consider certain evidence of Daiflon which had been previously excluded, to-wit: Daiflon's plans to construct a domestic refrigerant gas manufacturing facility.[11]

The defendants subsequently filed a petition for rehearing and suggestion for rehearing en banc which was denied.[12] Thereafter, within the time provided by the Rules of this Court, the defendants filed their petition for a writ of certiorari.

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[11]Daiflon's contention with respect to the trial judge's error in excluding relevant evidence pertaining to this issue is amplified in Appendix "F", its mandamus petition, at pp. 173a-175a. (See also Daiflon's Narrative Statement of the Case, Appendix "H", pp. 205a-206a.)

[12]The order of the Tenth Circuit denying the petition for rehearing and suggestion for rehearing en banc is included as Appendix "K" to this Brief.

Subsequent Proceedings in the District Court

On March 26, 1980, with the petition for certiorari pending (no stay order had been requested by defendants), counsel for Daiflon requested by letter an informal conference with the district court to discuss the possibility of the court's voluntary disqualification from further proceedings in accordance with 28 U.S.C. §455. In that letter Daiflon's counsel stated that it was the position of the plaintiff that "***in view of the proceedings in this matter, and the two appeals to the United States Court of Appeals for the Tenth Circuit, the Court's impartiality may reasonably be questioned. See *Webbe v. McGhie Land Title Co., et al.*, 549 F.2d 1358, 1361 (10th Cir. 1977); *U.S. v. Ritter*, 540 F.2d 459, 464 (10th Cir. 1976), cert. den., 97 S.Ct. 370." (The letter of March 26 is included as Appendix "L" to this Brief.)

On April 7, 1980 the district court filed an order which essentially represents a criticism of the Mandamus Opinion and indicated that the trial court is "***passionately convinced that the issue of liability has not been proven, though there exists some evidence otherwise." (The order of April 7 is included as Appendix "M" to this Brief.) The district court, following certain gratuitous observations with regard to the alleged "personal charges" and "threats" of plaintiff's counsel in the mandamus action and in its letter of March 26, 1980, proceeded to withdraw from the case and requested that it "***be relieved from all duties in connection therewith." (App. "M", p. 378a)

Following the filing by the trial judge of his order of April 7, 1980 the defendants filed what was styled as a "Second Petition for Rehearing", bringing to the appeal court's attention the recent withdrawal action taken by the trial judge. Essentially, the premise of the Second Petition for Rehearing was that the district judge had disclosed his rationale with regard to the granting of the motion for a new trial, and had indicated that he was convinced that no case had been made by Daiflon as to liability. Therefore, the defendants argued, the Court of Appeals operated upon an incorrect assumption with respect to the trial court's findings and conclusions in the new trial order. On June 6, 1980 the Court of Appeals, recognizing that there is no provision in the rules for the filing of a second petition for rehearing, declined to take any action thereon and determined that the petition should be denied in order to clear the court's records. (The order of the Court of Appeals for the Tenth Circuit denying the Second Petition for Rehearing is included as Appendix "N" to this Brief.)

ARGUMENT

I. THE COURT OF APPEALS FOR THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THE STANDARD OF REVIEW WHICH IT APPLIED UPON MANDAMUS TO THE DISTRICT COURT'S NEW TRIAL ORDER WAS NOT IN CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT.

The central thesis of the defendants' application for

certiorari is set forth at page 13 of their Petition:

> "***the Court of Appeals determined the previously well-settled, black-letter proposition that a new trial order is interlocutory in nature and not appealable under the final judgment rule. ***This use of the writ of mandamus, to review a discretionary determination of a trial court, is in direct conflict with decisions of this Court and of other courts of appeals announcing and applying rigorous criteria to govern mandamus."

This is essentially the same posture assumed by the defendants in the mandamus proceeding - the fallacy of which was addressed at the outset by the Court of Appeals:

> "The defendants take the position that there is no remedy under an extraordinary writ. The only possibilities, according to them, are, first, to grant their motion for judgment notwithstanding the verdict, or, second, to retry the case. Defendants do not give recognition to possible use of the writ on the basis of a 'clear abuse of discretion, an abdication of the judicial power.' *Paramount Film Distributing Corp. v. Civic Center Theater, Inc.*, 333 F.2d 358, 361 (10th Cir. 1964), citing *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed. 2d 290 (1957). The truth is that the extraordinary remedy route is limited, but it cannot be said to be nonexistent." (Mandamus Opinion, p. 1253).

The All Writs Act, 28 U.S.C. §1651(a) provides as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The dispositive inquiry, therefore, is "***whether the

circumstances here are agreeable to the usages and principles of law." (Mandamus Opinion, p. 1254) In making that determination, it is necessary to consider, as the Court of Appeals did in the Mandamus Opinion, the guidance which this Court has historically provided with regard to the propriety of the supervisory use of the extraordinary writ of mandamus. In 1953 this Court interpreted the Congressional policy underscoring the application of the All Writs Act:

> "In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consolidated Mines v. United States,* 1945, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566." *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953)[13]

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[13]In *Bankers Life* it was determined that the application presented was insufficient, under the court's prior decisions, to warrant the application of the extraordinary writ of mandamus. That case involved a treble damage action under 15 U.S.C. §15 which permits suit "in any district court of the United States in the district in which the defendant resides or is found or has an agent ***". The Georgia Insurance Commissioner, one Cravey, was not a resident of the Southern District of Florida (the trial forum), but was alleged to be a member of a conspiracy which carried on illegal business in that district. The district judge determined that the court had jurisdiction of the action, but that venue was not properly laid and ordered the action as to Cravey severed and transferred to the Northern District of Georgia where Cravey resided. The writ of mandamus requested the Fifth Circuit to compel the district judge to vacate and set aside the order of

(Footnote continued next page)

It is interesting to note that the defendants, in their petition for certiorari, cite *Bankers Life* on two separate occasions for the proposition that the petitioner for mandamus must show that his right thereto is "clear and indisputable". (Pet., pp. 16, 19) That proposition is, of course, uncontested by Daiflon, and was given full recognition by the Court of Appeals. (Mandamus Opinion, p. 1254) The defendants have, however, failed to disclose with regard to *Bankers Life* this Court's express recognition of the "clear abuse of discretion" standard of review. 346 U.S. at 383. This is the specific standard applied by the Court of Appeals in connection with its decision upon Daiflon's petition for mandamus.[14]

In *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957)

(Footnote continued from previous page)

severance and transfer. This Court affirmed the court of appeals; dismissal of the petition for mandamus, recognizing that Congress by 15 U.S.C. §15 placed definite limits on venue and civil treble damage actions:

> "Certainly Congress realized in so doing that many such cases would not lie in one district as to all defendants, unless venue was waived. It must, therefore, have contemplated that such proceedings might be severed and transferred or filed in separate districts originally. Thus petitioner's theory has all the earmarks of a frivolous, albeit, ingenious attempt to expand the statute." 346 U.S. at 384.

Accordingly, the petitioner's right to mandamus was not "clear and indisputable".

[14]"In summary, in order to grant relief, an appellate court must find not only that the trial judge's grant of a new trial was erroneous, but also that the judge's conduct of the litigation was such as to raise a conclusion that the judge clearly abused the discretion and that appeal is not an adequate remedy under the circumstances. (Mandamus Opinion, p. 1258).

this Court affirmed the power of the Court of Appeals for the Seventh Circuit to issue a writ of mandamus compelling a district judge to vacate an order transferring the trial of a case to an unsupervised master. In so holding, the Supreme Court reaffirmed its holding in *Bankers Life* that relief under the All Writs Act "***is meant to be used only in the exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power'***". 352 U.S. at 257, citing *Bankers Life & Casualty Co. v. Holland,* 346 U.S. at 383 (1953).

This Court, seven years following the decision in *La Buy,* again indicated that a writ of mandamus may be "appropriately issued where there is a 'clear abuse of discretion'." *Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964.)[15] This Court's recognition of the abuse of discretion standard in *Schlagenhauf* is expressly predicated upon the prior decision with regard to this issue in *Bankers Life.* 379 U.S. 104, 110, citing *Bankers Life & Casualty Co. v. Holland,* 364 U.S. at 383. Accordingly, *Bankers Life, La Buy* and *Schlagenhauf* support, without exception, the precise standard for review adopted by the Court of Appeals for the Tenth Circuit in the Mandamus Opinion.[16]

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[15]Defendants have apparently overlooked *Schlagenhauf* in connection with their review of Supreme Court cases pertaining to supervisory use of mandamus under the All Writs Act. It is not cited or otherwise referred to in the Petition.

[16]The Mandamus Opinion, unlike defendants' petition, fairly and thoroughly treats each of these cases. (Mandamus Opinion, pp. 1254-1255).

In 1967 the Supreme Court decided *Will v. United States,* 389 U.S. 90, (1967). This case has considerable importance with regard to the defendants' contention that the standard applied by the Court of Appeals in the Mandamus Opinion, and the court's logic in that opinion, conflicts with the decisions of this Court. In *Will v. United States* the defendant in a criminal proceeding filed a motion for a bill of particulars, containing thirty requests for information. With respect to one of defendant's requests, which sought information concerning oral statements of the defendant relied upon by the government to support the charge in the indictment, the district court ordered the government to furnish the defendant with such information. The United States Attorney declined to do so on the ground that the defendant's request constituted a demand for a list of the prosecution witnesses and that the trial judge lacked authority under Rule 7(f) of the Federal Rules of Criminal Procedure to require the production of such a list. The district court indicated its intention to dismiss the indictment in view of the government's refusal to comply with the court's order. However, before the order of dismissal was entered, the government obtained, on an *ex parte* basis, a stay from the Court of Appeals for the Seventh Circuit of all proceedings in that case. The Court of Appeals also granted the government leave to file a petition for writ of mandamus and issued a rule to show cause why a writ should not issue to compel the trial judge to strike the subject request from the bill of particulars

order. Thereafter, the Court of Appeals for the Seventh Circuit denied the writ. However, the government petitioned for reconsideration, and the Court of Appeals, without taking new briefs or hearing oral argument, reversed itself *and without opinion* issued a writ of mandamus directing the trial judge to vacate his order. This Court in granting certiorari and vacating the writ, observed that while the writ serves a "vital corrective and didactic function" in the federal system, such an objective could not be subserved "***without findings of fact by the issuing court and some statement of the court's legal reasoning." 389 U.S. at 107. This Court continued:

> "A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the Government rests its attempt to justify the action below.
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> * * *
>
> What might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals, we cannot and do not say." *Id.*

Two aspects of *Will v. United States* are especially relevant to the pending application of the defendants. *First,* the opinion of the Court of Appeals for the Tenth Circuit in the case *sub judice* fulfills those requirements which this Court found to be deficient in *Will.* The Court of Appeals analyzed, in considerable detail, the findings and conclusions of the district court within the perspective of the record presented. Here, the Court of Appeals, unlike the

Court of Appeals for the Seventh Circuit in *Will*, extensively reviewed all relevant federal court precedents, formulated the proper standard of review to be applied under the All Writs Act, and applied that standard to the specific facts as found by the Court of Appeals in this case. *Second*, the opinion in *Will* acknowledges the supervisory aspect of mandamus which is so critical to the inquiry presently before this Court, to-wit: that it serves a "vital, corrective and didactic function", recognizing that "***these aims lay at the core of this Court's decisions in *La Buy* and *Schlagenhauf* . . . " 389 U.S. at 107. Consequently, it is clear from *Will v. United States* that the Court's prior decisions in regard to the proper utilization of the extraordinary writ of mandamus (*La Buy* and *Schlagenhauf*) remain viable.

In *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 (1976) this Court reiterated that the petitioner for mandamus must satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable' ". 426 U.S. at 402.[17] Moreover, in *Kerr* it was stated that "***it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." (citations omitted). 426, U.S. at 402. Certainly, that principle is of fundamental significance to the matter

[17]This, of course, was recognized by the Court of Appeals for the Tenth Circuit in the Mandamus Opinion, and the court therein determined that Daiflon's right to such a writ was in fact "clear and indisputable". (Mandamus Opinion, pp. 1254, 1255, 1260).

presently before this Court. The Court of Appeals for the Tenth Circuit has, on two occasions, reviewed the conduct of the Honorable Luther Bohanon, District Judge, in connection with his most severe rulings against Daiflon. On the first occasion, the Court of Appeals determined that the trial judge committed reversible error in imposing the "drastic sanction of dismissal for Daiflon's failure to properly answer (in the trial court's opinion), a single interrogatory.[18] *Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221 (10th Cir. 1974), cert. den., 429 U.S. 886 (1976). On the second occasion, involving the order which gave rise to the Mandamus Opinion, the trial judge wholly disregarded the comprehensive findings of fact entered by the jury after a lengthy trial, and without rational basis, granted a new trial on all issues. The Court of Appeals acted not only on full briefs and argument, but on narrative statements of the case presented by the parties. The action of the Court of Appeals which the defendants now seek to review was in a large part a matter of discretion exercised within the realm of that Court's thorough review of the facts of the case and the law applicable to those facts. See *Kerr*, 426 U.S. at 402.

Finally, the *Kerr* case is unquestionably relevant to the issues before this Court by virtue of the following observation contained in that opinion:

> "More importantly, particularly in an era of excessively crowded lower court dockets, it is in the

[18]The Court of Appeals, in the Mandamus Opinion, refers to Judge Bohanon's 1974 dismissal order as being for a "trivial reason". (Mandamus Opinion, p. 1251)

> interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed ... until after final judgment has been rendered by the trial court." (citations omitted) 426 U.S. at 402.

Within the context of this case, the action taken by the Court of Appeals with respect to the limited utilization of the writ of mandamus to correct the trial court's clear abuse of discretion is fully consistent with this Court's comments in *Kerr* pertaining to the "final judgment" rule. That is, under the ruling of the district judge (assuming that Daiflon's petition had been denied) a new trial on all issues would have proceeded. Attendant to the trial would be, as indicated by the district court in his rulings upon the motion for new trial, further discovery on all issues. Following that discovery and retrial, the parties would have the right to appeal the district court's judgment, and Daiflon would have the concomitant right to appeal from the district court grant of a new trial subsequent to the first trial.[19] The action taken by the Court of Appeals on Daiflon's writ of mandamus merely serves to expedite disposition of all issues - without depriving the parties of their right to full appellate review. The trial judge's plans for additional discovery preceding the second trial have necessarily been limited by the opinion of the Court of Appeals. Moreover, the nature

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[19]At that juncture the defendants would also have the right to appeal from the district court's denial, following the first trial, of their motion for judgment notwithstanding the verdict.

and extent of the second trial, since it will relate to damages only, has likewise been restricted. Nevertheless, following that trial, the parties will have the right to seek appellate review with respect to the propriety of the district court's ruling in connection with the first judgment. Therefore, the limited use of mandamus in this case encourages "the fair and prompt administration of justice" and does not contribute in any matter whatsoever to the promotion of "piecemeal litigation".

The defendants place heavy reliance on the recent decision of this Court in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) in support of the proposition that: "Fairly read, *Will v. Calvert Fire Insurance Co.* does not support use of an 'abuse of discretion' standard on mandamus." (Petition, p. 18) That case has been specially dealt with by the Court of Appeals in the Mandamus Opinion. (Mandamus Opinion, p. 1255) As the court there pointed out, *Will v. Calvert Fire Insurance* reversed the decision of the Court of Appeals for the Seventh Circuit granting a writ of mandamus to overturn a district court's stay of federal court proceedings pending the completion of state court litigation. This Court held that a determination as to whether to defer to a state court proceeding was within the district court's discretion and under such circumstances it could not be concluded that the right to a writ was "clear and indisputable":

> "There are sound reasons for our reiteration of the rule that a district court's decision to defer proceedings because of concurrent state litigation is generally

> committed to the discretion of that court. No one can seriously contend that a busy federal trial judge, confronted both with competing demands on his time for matters properly within his jurisdiction and with inevitable scheduling difficulties because of the unavailability of lawyers, parties and witnesses, is not entrusted with a wide latitude in setting his own calendar.
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> * * *
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> Where a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable' ". 437 U.S. 665, 666.

Therefore, *Will v. Calvert Fire Insurance Co.* makes it very clear that "[p]lain abuse of discretion or abuse of power which add up to mere erroneousness [does not] furnish a basis for interlocutory review by writ." (Mandamus Opinion, p. 1255). The Court of Appeals in this case proceeded upon that specific assumption:

> "Granted that erroneousnes does not constitute a valid ground for issuance of the writ. Nevertheless, it cannot be said that the clear abuse of discretion standard is repudiated. So, therefore, if it is found that there is a disregard for proper procedure, or misuse of judicial power in the trial judge's conduct, this would constitute a clear abuse of discretion." *Id.*

Clearly, it is not fair or proper to conclude, as the defendants have, that the Supreme Court cases pertaining to supervisory mandamus prescribe a standard other than that applied by the Court of Appeals in this case. The Court of Appeals has considered each of the decisions of this Court which the defendants addressed both before the Court of

Appeals and here, and has fairly and properly concluded that the clear abuse of discretion standard applicable to the new trial order of the district court is viable and proper.

II. THE COURT OF APPEALS FOR THE TENTH CIRCUIT, IN APPLYING THE CLEAR ABUSE OF DISCRETION STANDARD TO THE NEW TRIAL ORDER, FOLLOWED ITS PRIOR OPINIONS - THE PRINCIPLES OF WHICH ARE FULLY CONSISTENT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

At pages 1255 through 1258 of the Mandamus Opinion, the Court of Appeals extensively reviewed prior decisions of the Court of Appeals for the Tenth Circuit and other courts of appeal with regard to the proper use of supervisory mandamus under the All Writs Act. Three salient points emerge:

1. There is no question but that previous decisions of the Court of Appeals for the Tenth Circuit are fully consistent with the Mandamus Opinion. See *State Farm Mutual Automobile Insurance Co. v. Scholes,* 601 F.2d 1151, 1154 (10th Cir. 1979); *Prop-Jets, Inc. v. Chandler,* 575 F.2d 1322 (10th Cir. 1978); *Paramount Film Distributing Corp. v. Civic Center Theater, Inc.,* 333 F.2d 358 (10th Cir. 1964). For example, in *Paramount Film,* the Court of Appeals for the Tenth Circuit specifically noted that the writ of mandamus there (which involved discovery matters) should only issue "***under exceptional circumstances

which amount to a clear abuse of discretion, an abdication of the judicial function, or the usurpation of judicial power." 333 F.2d at 361. *La Buy v. Howes Leather Co.* is cited as authority.[20]

2. The Court of Appeals for the Tenth Circuit discusses, in some detail, the decision of the Court of Appeals for the Eighth Circuit in *General Motors Corp. v. Lord*, 488 F.2d 1096 (8th Cir. 1973). In that case the Court of Appeals for the Eighth Circuit delineated certain circumstances in which review by mandamus is appropriate. There the Court of Appeals stated the general rule that the grant of a new trial *without more* is insufficient to justify the use of the writ.[21] The defendants, in their petition, describe *General Motors Corp. v. Lord* as involving "***a case, *like the present*, involving a request for mandamus to overturn a new trial order based on erroneous admission of evidence." (emphasis supplied, Petition, p. 20) Contrary to the defendants' assertions, the facts of *Lord* make that case inapposite to the matters involved here. In that case the jury returned a verdict for the defendant General Motors ("GM") finding that GM's refusal to renew a franchise with the plaintiff was not improper. The plaintiff sought a new

[20]The Court of Appeals for the Tenth Circuit in *Paramount Film* determined, on the facts present there, that the petitioner did not demonstrate that the trial judge's order (which involved production of documents under Rule 34), constituted a clear abuse of discretion. The writ was denied.

[21]The Court of Appeals for the Tenth Circuit, in the Mandamus Opinion, agreed: "We are, of course, constantly aware of that." (Mandamus Opinion, p. 1257)

trial on the basis of the trial court's commission of allegedly prejudicial error in allowing testimony relative to the misrepresentations of the financial condition of the company, the out-of-trust condition of the company, and irregularities in the financial records of the company. A new trial was granted, and GM petitioned for mandamus on the bases of abuse of discretion and lack of jurisdiction with respect to the new trial order. The court in *Lord* determined that the essential question addressed by the trial court was no different than any other evidentiary issue which trial judges decide in the course of granting motions for new trial, and to grant the extraordinary relief would abrogate the final judgment rule. *Id.*, p. 1100. The court then concluded:

> "The resolution of this question at this time would have little impact on the administration of justice generally and, since it is clear that the trial court had jurisdiction to act, mandamus is clearly inappropriate."

There are substantial and fundamental differences between the circumstance of *Lord* and the case at bar:

(a) In *Lord*, unlike this case, specific and legally sufficient grounds were outlined by the trial judge in support of his order granting a new trial; that point was not at issue. *Id.*, p. 1100.

(b) The order under attack in *Lord* could not be deemed to be characteristic of an erroneous practice likely to recur.

(c) *Lord* did not involve an action which the district court had previously dismissed with prejudice, thereby

requiring the party to seek and obtain relief with the Court of Appeals years prior to the filing of the write.

(d) The order granting a new trial in *Lord* did not reflect the disposition of that trial judge to embark upon the course of conduct which would be inconsistent with the verdict winner's right to fair treatment upon the second trial.

(e) There was no evidence in *Lord* of statements by the trial judge which reflected an attitude and approach to the litigation inconsistent with the rights of the petitioner there to a fair trial.

(f) The record in *Lord* did not reflect grievious errors committed at trial against the verdict winner which were likely to recur upon retrial.

(g) The district court here refused to act, following the jury verdict, in accordance with the clear mandate of a federal statute (refusal to award threefold damages, 15 U.S.C. §4); no such error was alleged or commited in *Lord*.

(h) The trial judge in *Lord* did not indicate that the second trial would only proceed following additional discovery, of undetermined length.

In any event, the law applied by the court in *Lord* is not in conflict with the law applied by the Court of Appeals for the Tenth Circuit in Daiflon - the results reached by the circuit courts differ only because they are different cases based on different facts.

3. The court of Appeals for the Tenth Circuit discusses the opinion of the Court of Appeals for the Second Circuit

in *Grace Lines, Inc. v. Motley*, 439 F.2d 1028 (2d Cir. 1971). There, a writ of mandamus was issued to reinstate a jury verdict which had been vacated upon a motion for new trial. The trial court had ordered a new trial three days after declaring a mistrial; accordingly, the Court of Appeals for the Second Circuit determined that there was a misuse of the Rules of Civil Procedure which precluded the defendants' use of Rule 50(b) F.R.Civ.P. for judgment notwithstanding the verdict. This constituted a violation by the trial judge of Rule 50(b). Granting mandamus, the Court of Appeals for the Second Circuit acknowledged the "clear abuse of discretion" standard:

> "This is not to say that supervisory mandamus is intended, or can be used, to authorize the indiscriminate use of prerogative writs as a medium for reviewing interlocutory orders. Mandamus will lie, in the sound discretion of the appellate court, where the trial court has exceeded or wrongfully refused to exercise its judicial power or has committed a clear abuse of discretion." 439 F.2d at 1031, fn. 2.

In their petition for mandamus, the defendants treat the opinion in *Grace Lines* with that lack of proper regard which they apparently reserve for those judicial decisions which are inconsistent with their theory of the case. While *Grace Lines* is discussed in some length by the Court of Appeals in the Mandamus Opinion (pp. 1257-1258), the defendants only mention the case in passing at the end of their footnote 16 at page 19 of the Petition. They describe the *Grace Lines* decision as holding that "***certain aspects of the new trial order violated Rule 50(b) of the Federal

Rules of Civil Procedure and that the court therefore had 'exceeded judicial power' ***in ordering a new trial". (Petition, p. 19, fn. 16) The defendants neglect to state, for whatever reason, that the Court of Appeals for the Second Circuit specifically recognized the "clear abuse of discretion" standard as a proper basis for the use of the extraordinary writ of mandamus in regard to the review of new trial orders. 439 F.2d at 1031, fn. 2.

III. THE EXCEPTIONAL CIRCUMSTANCES PRESENTED BY THE NEW TRIAL ORDER SUPPORT THE CONSIDERED AND LIMITED EXERCISE OF DISCRETION BY THE COURT OF APPEALS FOR THE TENTH CIRCUIT IN REINSTATING THE JURY VERDICT AS TO LIABILITY.

The Court of Appeals concluded its review of the law applciable to Daiflon's petition by holding that, in order to grant the relief sought, the Court of Appeals must find (i) that the district court's grant of a new trial was erroneous, (ii) that the judge's conduct of the litigation was such as to raise the conclusion that he clearly abused his discretion; (iii) and that appeal is not an adequate remedy under the circumstances. (Mandamus Opinion, p. 1258).[22] To make this determination, the Court of Appeals undertook to analyze the trial judge's rulings and comments (fully set

[22]The Court of Appeals determined at the outset that Daiflon had the burden of showing that its right to the writ was "clear and indisputable". (Mandamus Opinion, p. 1254, 1255)

forth in the Mandamus Opinion at pp. 1261-1263) in relation to the principle that in our judicial system the jury, not the trial judge, is the primary trier of fact:

> "[I]t has long been the rule that a trial judge should not act merely as a '13th juror' and set a verdict aside simply because he would have reached a different result had he been the trier of fact. Rather, the judge's duty is to exercise a more limited judicial discretion ... A trial judge is not to interfere with the verdict, 'unless it is quite clear that the jury has reached a seriously erroneous result."

See *(Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978), cited with approval in the Mandamus Opinion, p. 1260. The Court of Appeals noted that the trial judge did attempt to provide a rationale for the "excessive" jury award - even though that rationale was clearly based upon incorrect statements regarding the evidence presented. (Mandamus Opinion, pp. 1258-1259) The Court of Appeals stated that "***the cases teach us that subject only to the limitation of the Seventh Amendment the trial court's discretion is most full and complete when the court is considering a factual question as to damages." (citations omitted) *Id.*, p. 1259. Therefore, the Court of Appeals was unwilling, despite the argument of Daiflon, to vacate the district court's determination based upon possible erroneous premises which the district court acted upon in connection with the damage issue "***because the trial court did hear the evidence in its entirety and hence it is in a much better position to judge this issue that is an appeallate court." *Id.*, p. 1260.

By the same reasoning, the lower court noted that it was "***apparent that it is the amount of the verdict rather than any other factor which caused the judge to enter the order for new trial." *Id.*, p. 1259. The "clear abuse of discretion" committed by the trial court was that there was *no rational basis* offered by the judge for his invalidation of the jury verdict in its entirety. *Id.*, p. 1260.

> "He appeared to have ordered a new trial primarily because he was shocked at the size of the verdict. By so doing, the trial court invaded the province of the jury as the primary tier of fact. ***" (citations omitted) *Id.*

In this regard the Court of Appeals made the observation that the trial judge indicated his belief that liability was established - and that if he had any doubts about the liability issue he would have granted the defendants' motion for judgment notwithstanding the verdict.[23] *Id.*, p. 1259. The Court of Appeals properly noted that the district court unequivocally ruled that judgment n.o.v. was not appropriate "under any thinking or analysis". (Mandamus Opinion, p. 1259) Let us recall, also, that the district court had previously denied the motion for

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[23]The only other conclusion which can be drawn from the trial judge's conduct of the case and his comments and rulings upon the motions and judgment n.o.v. is that the court recognized that if he had granted the motion for judgment n.o.v., as well as the new trial motion, the entire ruling would be subject to appeal, thus divesting him from further authority with respect to the case. This possibility is not inconsistent with the observation by the Court of Appeals that Judge Bohanon should not be in a position of advocacy, and is precluded from assuming any role in the development of the defendants' case. (Mandamus Opinion, p. 1258)

summary judgment as to liability and the motions for directed verdict during trial. Furthermore:

> "On the subject of liability, this is not a case in which the evidence to establish liability is vague and questionable. The evidence supported the conclusion that the several defendants engaged in a 'buccaneering' scheme designed to eliminate the plaintiff as a contender. To be sure, Diaflon's market share was relatively small, but the price manipulation and the timing lend itself to the interpretation that elimination of Diaflon was an object of the conspiracy. Defendants lowered their prices by 13%, thus foregoing substantial profits." (Mandamus Opinion, p. 1259).

Finally, it must be borne in mind that the Court of Appeals thoroughly reviewed the briefs of the parties in this case, those parts of the district court record which the parties designated in their briefs for the court's consideration, the narrative statements of the case and the arguments of counsel before it was determined, in the exercise of discretion, that the writ should issue to overturn the new trial order relating to the liability part of the verdict. As stated by this Court in *Kerr v. United States District Court for the Northern District of California, supra,* the issuance of the writ "***is in large part a matter of discretion with the court to which the petition is addressed." Dailfon respectfully submits that the Court of Appeals in this case properly exercised that discretion - giving full deference and the benefit of all doubt to the district court's decision. This is amply demonstrated by the Court of Appeals views with regard to the verdict on damages.

IV. THE DEFENDANTS' CONTENTION THAT THE COURT OF APPEALS FOR THE TENTH CIRCUIT HAS MADE FINDINGS AS TO THE ISSUE OF LIABILITY UPON AN INCOMPLETE RECORD IN PLAINLY WRONG.

At page 25 of the petition for certiorari the defendants state that "***the Court of Appeals proceeded to make factual findings on liability..." (Petition, p. 25, fn. 21) This is incorrect. The Court of Appeals merely found that the trial judge had no rational basis for granting a new trial other than the magnitude of the verdict. (Mandamus Opinion, pp. 1259-1260) Obviously, the Court of Appeals did not purport to (nor could it) determine that, as a final and unappealable matter, the defendants are liable to Diaflon for violation of the antitrust laws. The effect of the mandamus ruling is that the second trial will proceed on the issue of damages only, and following that trial all issues will be subject to review by the Court of Appeals in an appellate proceeding pursuant to the provisions of 28 U.S.C. §1291.

The defendants further contend that the Court of Appeals action in reinstating the jury verdict as to liability was improper in view of the fact that it did not have a full record before it. Two points are relevant here: (1) the defendants are apparently reacting to the fact that the Court of Appeals recognized, in the Mandamus Opinion, that the defendants wholly failed to comply with the order of the Court of Appeals with respect to the preparation of "***a narrative statement of the case along the lines provided by

Rule 10(d) of the Rules of Appellate Procedure." (App. "G", p. 180a) For whatever reason, the defendants elected to merely file an argumentative brief, which did not purport to summarize the evidence presented at trial;[24] (App. "I", p. 308a) and (2) the defendants, as Daiflon, had full opportunity to include in the narrative statement, or by way of attachment or supplementation to briefs filed, the portion or portions of the record deemed to be relevant in connection with the court's consideration of the petition for a writ of mandamus. The defendants' present complaint with regard to the sufficiency of the record for mandamus purposes is disingenous at best.

The defendants' contentions pertaining to the record considered by the Court of Appeals presume that the Court of Appeals undertook, in essence, a review of the evidence as it would in connection with the disposition of an appeal from a final judgment. The defendants, in advancing this position, apparently misapprehend the nature of the mandamus proceeding. The rulings and comments of the trial judge were examined, in view of the record presented, to determine whether the trial judge provided a rational basis, under applicable law, for vacation of the jury verdict in its entirety. The approach of the Court of Appeals was fully consonant with its responsibilities in connection with

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[24] "The defendants' statement was relatively brief and had an argumentative tone and sought to answer petitioner's reply brief. Essentially, it was a brief and argument. Only the testimony of one witness was summarized, and that was not fully presented." (Mandamus Opinion, pp. 1251-1252)

the supervisory use of mandamus under the All Writs Act. The appellate remedies of all parties have been fully preserved.

V. THE DEFENDANTS' RELIANCE UPON THE POST-MANDAMUS ORDER OF THE DISTRICT COURT IS UNJUSTIFIABLE AND CONSTITUTES A MISUSE OF THE CERTIORARI PROCESS.

On April 7, 1980 the district judge voluntarily entered an order in which he withdrew from all further proceedings in the case and stated in writing his "response" to the Mandamus Opinion. (App. "M", p. 375a) Based upon that order the defendants moved for a "second rehearing" which was properly denied by the Court of Appeals for the Tenth Circuit. (App. "N", p. 379a) In the petition for certiorari, the defendants provided this Court with lengthy excerpts from the April 7 order, apparently in a belated effort to provide some basis — whether rational or not — for the district court's new trial order as to liability. Quite clearly, as the Court of Appeals recognized, there is no authority for such a procedure, and it should not be considered by this Court for any reason upon certiorari. The petition for a writ of mandamus named the trial judge as a respondent, and the trial judge elected not to appear in the case. Therefore, his post-mandamus order, as it relates to the propriety of the action taken on the post-trial motions, is a nullity.

CONCLUSION

The petitioners have not sustained their burden of establishing that there are special and important reasons why a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Tenth Circuit. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Honorable Court; nor has the Court of Appeals decided a federal question in a way which conflicts with applciable decisions of this Court or of another Court of Appeals. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 29 day of July, 1980 I mailed a true and correct copy of the foregoing instrument to the following:

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